Editor's note: Reconsideration granted; decision vacated -- See Sarah F. Lindgren (On Reconsideration), 54 IBLA 181 (April 22, 1981)

SARAH F. LINDGREN
EMERY V. SHOWALTER

IBLA 76-146, IBLA 76-148 Decided December 31, 1975

Two appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications filed by the appellants.

Affirmed.

1. Alaska: Native Allotments

   The substantial use and occupancy required under the Native Allotment Act must be achieved by the Native himself as an independent citizen (or family head) and such use must be at least potentially exclusive of others. Although a minor may initiate such use and occupancy, use and occupancy by a dependent accompanied by his parents does not qualify.

2. Alaska: Native Allotments--Withdrawals and Reservations: Effect of

   An allotment right is personal to one who has fully complied with the law and the regulations. An applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish the right. The applicant must have completed the 5-year period of use and occupancy prior to withdrawal of the land to qualify.

3. Alaska: Native Allotments--Rules of Practice: Appeals: Hearings

Where the decision appealed from is based essentially on the facts disclosed by appellant, there is no dispute as to any material fact, and the sole question presented is a legal issue, no evidentiary hearing is required on appeal.

APPEARANCES: James Holloway, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

These two cases have been consolidated on appeal because of the similarity in the material facts and the identity of the legal issues presented.

Sarah F. Lindgren appeals from a July 15, 1975, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application (AA-8228). The basis of the decision below was that the land applied for was withdrawn on December 17, 1941, by Executive Order No. 8979 establishing the Kenai National Moose Range.

The BLM noted that the appellant was a child of 10 years when she claimed to have commenced use and occupancy and was 16 years old when the land was withdrawn. The BLM concluded that the applicant did not establish 5 years of qualifying substantial use and occupancy prior to withdrawal.

Appellant's Native allotment application, filed with the Bureau of Indian Affairs on December 8, 1971, and received by the BLM on November 10, 1972, alleged use and occupancy of the land applied for from "1935 to 1939," "1946 to 1952," and "1960 to present." Under the remarks section of the application form, appellant stated:

> My ancestors used this land prior to the establishment of the Moose Range and I have used it since 1947 for subsistence living.

Appellant's affidavit filed with the BLM on April 25, 1975, relates that:

> Since 1935 my father has taken me to this place to fish, hunt, and pick berries. * * * We would camp several days on my land * * *.

Further declarations in the affidavit of the appellant make it clear that the tract of land in question was used in common by the family unit consisting of the applicant and her father and brother. The record also discloses that the applicant was born in the year 1925.

Emery V. Showalter appeals a decision of the Alaska State Office, BLM, dated July 8, 1975, rejecting his Native allotment application. The decision was based on the fact that the subject land was withdrawn by Executive Order No. 8979 effective December 17, 1941. The BLM found that the record failed to establish that applicant achieved 5 years of substantially continuous use and occupancy as an independent citizen in his own right prior to withdrawal of the land and that, accordingly, the application must be rejected.

Showalter's application, dated January 12, 1971, alleged use and occupancy of the land from 1955 to the present. A supplemental statement by the applicant dated October 16, 1972, indicated that the land was used in "August & September 1941 for hunting and fishing with my Dad * * *." The record further reveals that the applicant was born on December 11, 1932.

Counsel for both appellants argues that: Native aboriginal rights preclude effective withdrawal of the land; tacking of ancestral use should be allowed; a minor child may establish the requisite use and occupancy; the policy of requiring 5 years of use and occupancy prior to withdrawal was not developed in accordance with § 4 of the Administrative Procedure Act, as amended, 5 U.S.C. § 553 (1970), and is thus invalid; 5 years of use and occupancy is only required of Native allotments in national forests; and appellants are entitled to hearings.

The Act of May 17, 1906, ch. 2469, 34 Stat. 197, as amended, ch. 891, 70 Stat. 954, 1/ authorized the Secretary of the Interior to allot not more than 160 acres of land in Alaska to an Indian, Aleut, or Eskimo who is both a resident and a Native of Alaska

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1/ This statute was repealed by § 18(a) of the Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1973), subject to applications pending before the Department on December 18, 1971.

and who is 21 years old or the head of a family. The statute clearly states that the land to be allotted must be "vacant, unappropriated, and unreserved." 70 Stat. 954. In addition, the statute mandates that the applicant must make satisfactory proof to the Secretary of the Interior of "substantially continuous use and occupancy of the land for a period of five years." 70 Stat. 954.

[1] The substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen for himself (or as head of a family) and not as a minor, dependent child occupying or using the land in the company of his parents. Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). This does not mean that a minor may not establish qualifying use or occupancy--the issue is the nature of the use and occupancy. It must be achieved by an independent citizen in his own right and it must be at least potentially exclusive. John Nanalook, 17 IBLA 353, 355 (1974); 43 CFR 2561.0-5(a).

[2] An allotment right is personal to one who has fully complied with the law and the regulations and an applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish the right. Susie Ondola, 17 IBLA 359, 361 (1974). 2/ The applicant for a Native allotment must have completed the 5-year period of substantially continuous use and occupancy prior to a withdrawal of the land in order to qualify for an allotment. Susie Ondola, supra at 361. 3/

2/ The argument that aboriginal use and occupancy and continued use and occupancy by applicant's ancestors preclude the segregative effect of a withdrawal and that applicants may use these rights as a basis for claiming a Native allotment has previously been rejected by this Board. Ann McNoise, 20 IBLA 169, 173 (1975); Georgianna A. Fischer, 15 IBLA 79, 81 (1974).

3/ Appellant also asserts that the requirement of 5 years of substantial use and occupancy of the premises prior to any withdrawal of the land applied for was not adopted in accordance with the requirements of § 4 of the Administrative Procedure Act, as amended, 5 U.S.C. § 553 (1970), and is thus invalid. This contention was rejected in Herman Joseph (On Reconsideration), 22 IBLA 266, 268 (1975).

The 5-year period of substantially continuous use and occupancy required by § 3 of the Act of May 17, 1906, as amended, supra, expressly applies to all allotments made under the Act and not merely those allotments made in national forests. Paul Koyukuk, 22 IBLA 247, 250 (1975); Heldina Eluska, 21 IBLA 292, 293 (1975); see 43 CFR 2561.2(a).

The record below in both appeals clearly supports the decisions of the Alaska State Office on these legal grounds. Sarah Lindgren's use and occupancy, according to her own statements, was in the company of her father and brother, at least prior to 1947. The applicant was only about 16 years old when the land was withdrawn in 1941, and thus she would have had to initiate use and occupancy as an independent citizen in her own right at age 11. Appellant has not shown 5 years of substantially continuous use and occupancy, at least potentially exclusive of others, as an independent citizen in her own right prior to the withdrawal. James S. Picnalook, Sr., 22 IBLA 191 (1975).

The appellant, Emery V. Showalter, has also failed to show 5 years of qualifying use and occupancy prior to the withdrawal of the land. Appellant was only 9 years old when the land was withdrawn. Appellant initially alleged use and occupancy from 1955 and then filed an amended allegation in which he asserted that he hunted and fished on the land with his father for 2 months in 1941. This is not sufficient.

[3] Appellants' requests for a hearing are denied. The decisions are based essentially on the facts as disclosed by the appellants themselves. An evidentiary hearing is not necessary where there is no dispute as to any material fact and the sole question presented is a legal issue. Ann McNoise, 20 IBLA 169, 171 (1975).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Edward W. Stuebing
Administrative Judge